IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898

RICHARD F. CAFFREY,
COUNTY CLERK, OKLAHOMA COUNTY, OKLAHOMA TERRITORY.
Plaintiff in Error and Appellant,

v.

TERRITORY OF OKLAHOMA,
EX REL. HARPER S. CUNNINGHAM, ATTORNEY GENERAL,
Defendant in Error and Appellee.

Motion of Richard F. Caffrey, Plaintiff in Error and Appellant, for an Order Allowing Him a Supersedeas, or Other Appropriate Order, in said Cause.

Comes now the plaintiff in error and appellant, Richard F. Caffrey, by his counsel James R. Keaton, and moves this Honorable Court to make an order granting him the right to give a good and sufficient

supersedeas bond staying proceedings upon the judgment of the Supreme Court of the Territory of Oklahoma, rendered September 3rd, 1898, and reaffirmed December 2nd, 1898, in this cause and to quash. annul and set aside the order of said Supreme Court of said Territory dated December 2nd, 1898, committing this plaintiff in error and appellant to the jail of Ohlahoma County said Territory and also to annul, set aside and hold for naught the orders of the Honorable John H. Burford, as Chief Justice of said Court, dated December 5th and 8th, 1898, respectively, denying this plaintiff in error and appellant the right to have a supersedeas in said cause and overruling his applications therefor; and this plaintiff in error and appellant asks this Honorable Court to make and pass such other and further appropriate order or orders in this behalf as may, under the law and facts, be just and necessary.

In support of the foregoing motion this plaintiff in error and appellant by his counsel aforesaid shows the following:

FIRST.

That on the 3rd day of September, 1898, the said Supreme Court of Oklahoma Territory rendered judgment in this cause as follows:

> "Now on this 3rd day of September, 1898, came the above named parties, plaintiff and defendant, by their respective counsel, and this cause comes on to be heard before the court, upon the alternative writ, the return of the defendants to the alternative writ, and the demurrer to said re-

turn. And the court being fully advised in the premises and having duly considered said cause, sustains said demurrer, to which ruling the defendant excepts; and said cause is now submitted to the court upon the pleadings and demurrer, and the court finds that the matters and facts stated and set forth in the alternative writ, are true; and that the motion filed by the defendants to quash said alternative writ ought not, under the facts and the law, to be sustained.

"It is therefore considered and ordered that said demurrer be and the same is sustained, and a peremptory writ of mandamus is hereby ordered to issue, as prayed for in plaintiff's original application, and it is further ordered, that the plaintiff recover of the defendant his costs herein, taxed at six and forty one-hundredths dollars."

(Rec. p. 27.)

That on the 21st day of September, 1898, said judgment was filed and entered and a peremptory writ of mandamus issued in pursuance of said judgment and on September 22nd, 1898, said writ was served on this plaintiff in error. (Rec pp 29 and 30.)

SECOND.

That on October 1st, 1898, this plaintiff in error through his then counsel, Robert Kittle, filed in said cause an answer and return to said peremptory writ of mandamus in which said pleading he asks for relief as follows:

"WHEREFORE, Defendant prays this Honorable Court to set aside its decision, judgment, orders and writ of peremptory mandamus against him for want of jurisdiction over the parties and subject matter in controversy in the above entitled action, on a reconsideration of the pleadings, evidence and exceptions taken on the trial, and of the facts stated in the foregoing return and reply filed herein.

"The court failing so to do, defendant now takes an appeal to the Supreme Court of the United States, from said decision, judgment, orders, rulings and the final order and decision directing said writ to be issued, and executed and all proceedings leading to final order.

"Defendant asks this court to allow said appeal; to direct a complete transcript of the record of proceedings, evidence, files, objections and exceptions taken on the trial of said cause to be furnished to perfect said appeal. That plaintiff be adjudged to pay to defendant his costs and and damages in and about his defense herein."

(Rec. p. 35.)

That thereafter and on the 12th day of November, 1898, the defendant in error (plaintiff below) filed a motion for a rule on this plaintiff in error (defendant below) to show cause why he should not be punished for contempt of the Supreme Court of said Territory for failing to comply with its said judgment of September 3rd, 1898, and that, in pursuance to the prayer

of said motion a rule upon plaintiff in error to show cause before said Supreme Court on the 2nd day of December, 1898, was granted by the Chief Justice on November 22nd, 1898, and issued by the clerk of said court on the 23rd day of November, 1898. (Rec. pp. 38, 41, 42 and 44;) that on the said 2nd day of December, 1898, plaintiff in error filed in said cause and presented to said court his answer and return to said rule to show cause in which he prayed as follows:

> "Wherefore, this affiant prays that he be granted a rehearing in said cause upon the grounds and for the reasons set forth in said application there-for prepared and filed by the said Robert Kittle, or in the event that this court determines that such rehearing should not be granted, then affiant asks that he be granted an appeal to the Supreme Court of the United States, and that the amount of a supersedeas bond, staying the execution of judgment herein, be fixed by this court."
>
> (Rec. pp. 47 and 48.)

That on the same date said Supreme Court passed an order overruling and denying this plaintiff in error's answer and return to said peremptory writ of mandamus and refusing to grant him a rehearing whichsaid order, omitting the caption, is in words and figures as follows:

> "Now on this second day of December, 1898; the court overrules and denies the answer of defendant to the peremptory writ of mandamus heretofore issued, and refuses to grant a rehearing; to which order the defendant, by counsel,

excepts, and prays an appeal to the Supreme Court of the United States, which is allowed, and the Chief Justice is directed to sign all writs, orders and citations."

(Rec. p. 50.)

That thereafter and on same date said Supreme Court made the following order in said cause upon the said rule to show cause and the answer thereto:

"And now on this 2nd day of December, A. D., 1898, this cause comes on to be heard upon the rule heretofore issued citing the defendant, Richard F. Caffrey, to appear and show cause, if any he have, why he should not be adjudged in contempt of court for failure to comply with the peremptory writ of mandamus heretofore granted and issued in said cause. And said cause coming on to be heard upon the showing made by the Attorney General, and the answer of said defendant to said rule; and the court being fully advised, finds that the said Richard F. Caffrey has not complied with the commands of the said peremptory writ of mandamus, or performed the duties therein required of him, and that he has shown no legal excuse for said failure, it is now

"Ordered and adjudged by the court that the said Richard F. Caffrey is in contempt of this court. And it is further ordered that he be imprisoned in the county jail of Oklahoma County until such time as he shall in all things perform the duties and do the things required of him, as commanded in said peremptory writ of mandamus. And the sheriff of said Oklahoma

County is hereby commanded to immediately arrest the said Richard F. Caffrey and commit him to said jail.

"It is further ordered, that if the said Richard F. Caffrey shall file with the sheriff of said Oklahoma County his affidavit, to the effect that he is ready and willing to at once begin the work of extending said taxes upon the tax rolls of said county, as commanded in said writ, and carry the same on to completion as rapidly as the same can be done; and that he will promptly and energetically perform all the requirements of said writ, then the said sheriff shall release him from imprisonment, in order to enable him to perform said duties, and the said commitment shall be suspended until the further order of this court."

(Rec. pp. 52 and 53.)

THIRD.

That on the 5th day of December, 1898, this plaintiff in error and appellant filed in said cause a petition for a writ of error and petition on appeal together with his assignments of error. (Rec. pp. 55 to 64.) That thereafter and on the same date his petitions for writ of error and appeal were allowed by the Honorable John H. Burford, as Chief Justice of the said Supreme Court of Oklahoma Territory, but in the order allowing said writ of error the application of this plaintiff in error for a supersedeas is denied. (Rec. p. 66.) Thereafter and on same date true copies of said writ of error and appeal were lodged in the office

of the clerk of said court for the adverse party and citations on said writ of error and appeal were signed. (Rec. pp. 68, 69, 71.) That thereafter and on December 8th, 1898, plaintiff in error filed in said cause in the court below his written application for an order allowing him to give supersedeas bond therein which said application, omitting the caption is as follows:

> "Comes now the defendant, Richard F. Caffrey, by his attorney, and asks the Hon. John H. Burford, Chief Justice of the said Supreme Court of the Territory of Oklahoma, to grant him the right to give bond in said cause superseding and staying the execution of the judgment rendered therein, and also asks that the amount of said bond be now fixed by the said Chief Justice, and shows in support of this application that on the 5th day of December, 1898, this defendant filed in said court his petition for a writ of error with assignments of errors attached, and also his petition on appeal, with assignment of errors attached, and that on said date said petitions were presented to the Hon. John H. Burford, as Chief Justice of said Court, and thereupon the said Chief Justice made an order granting said writ of error and said writ of error was thereupon, and on the same date, allowed by said Chief Justice and issued and made returnable on the 3rd day of January, next. On said date said Chief Justice also allowed the appeal prayed for; that thereafter, and on the said 5th day of December, 1898, this defendant caused to be lodged in the office of the clerk of

this court a true and correct copy of said writ of error and of said appeal for the adverse party, towit, the plaintiff herein, and that said copies of said writ of error and appeal are now so deposited with said clerk for such purpose; that this defendant further shows to said Chief Justice that the judgment in this case is one which may properly be superseded, upon the execution of a good and sufficient bond, which he now hereby offers to execute and furnish in such sum as you, the said Chief Justice, may deem reasonable and proper. James R. Keaton, Attorney for Defendant."

(Rec. p. 73.)

That thereafter and on the same date said application was presented to the Hon. John H. Burford, Chief Justice of said court as aforesaid, and he made the following order denying same, towit:

"Now on this eighth day of December, the defendant by his counsel applies for a supersedeas and stay of proceedings in the above entitled cause, and the same coming on for hearing before me in chambers and it appearing that the appeal in said cause and application for writ of error was not taken or requested until after the defendant had been committed to the county jail of Oklahoma County, by the judgment of the Supreme Court adjudging him in contempt for failure to obey the peremptory Writ of Mandamus in said cause, and believing that there can be no serious controversy as to the questions of law

involved in said cause, said application for a supersedeas is hereby overruled and denied. To all of which defendant excepted and excepts.

Done in Chambers at the city of Guthrie this December 8th, 1898

JOHN H. BURFORD,
Chief Justice."

(Rec. p. 76.)

The references hereinbefore made are to the pages of the original transcript of the record as the same had not been printed at the date of the preparation and filing of this motion but the material portions of said record, so far as relates to the questions presented by this motion, are copied herein.

Respectfully Submitted,

JAMES R. KEATON,
For Plaintiff in Error and Appellant.

ARGUMENT UPON MOTION.

No point has been made against either of the applications of plaintiff in error for a supersedeas on the ground that it was not made within the statutory time. In fact, no such objection can be successfully urged, notwithstanding more than sixty days elapsed after the rendition of the original judgment and prior to the lodging of the writ of error and appeal in the office of the Clerk of the Territorial Supreme Court, because said court entertained, considered and passed upon the answer and return of plaintiff in error to the peremptory writ of MANDAMUS wherein he asked that the original judgment be set aside, etc. This gave

plaintiff in error sixty days from the date of the ruling on said answer or application within which to take the necessary steps to procure a supersedeas.

Section 1007 (R. S. U. S.) providing how a writ of error may be a SUPERSEDEAS reads as follows:

"In any case where a writ of error may be a super-
"sedeas, the defendant may obtain such supersedeas
"by serving the writ of error, by lodging a copy there-
"of for the adverse party in the clerk's office where the
"record remains, within sixty days, Sundays exclusive,
"after the rendering of the judgment complained of,
"and giving the security required by law on the issu-
"ing of the citation. But if he desires to stay pro-
"cess on the judgment, he may, having served his
"writ of error as aforesaid, give the security required
"by law within sixty days after the rendition of such
"judgment, or afterward with the permission of a
"justice or judge of the appellate court. And in such
"cases where a writ of error may be a supersedeas,
"execution shall not issue until the expiration of (the
"said term of sixty) (ten) days."

Under this section it has been uniformly held by all the federal courts that the time within which a plaintiff in error or appellant may have a supersedeas does not begin to run until a motion for a new trial or application to set aside the decree or judgment or petition for rehearing (when entertained and considered by the lower court) has been passed upon.

"So the time begins to run from entry of the de-
"cree * * * but if the court entertains a motion to

"open the decree the time does not begin to run until "the motion is disposed of."

Desty's Federal Proceedure, 6th Ed., p. 572.

See also Brockett vs Brockett, 2 How. 238.

Railroad Co v. Bradleys,7 Wall. 575.

Memphis v. Brown, 94 U. S 715.

"Where the writ of error was sued out and served "within sixty days after the decision of a motion for "rehearing, this was in time to secure the SUPER-"SEDEAS."

Texas & Pac Ry. Co. v. Murphy, 111 U. S. 488.

See also Slaughter House Cases, 10 Wall. 273 (289.)

Providence Rubber Co. v. Goodyear, 6 Wall. 153.

"A writ of error will operate as a supersedeas, "under section 1007 of the Rev. St., if duly served "'within 60 days, Sunday exclusive', after a motion "for a new trial has been overruled."

Rutherford v. Penn. Mut. Life Ins. Co., 1 Fed. Rep. 456.

It may be insisted by counsel for defendant in error that the pleading filed by plaintiff in error in the court below on October 1st, 1898,entitled "Return and Reply to Writ of Mandamus" is not such a pleading as can, under the rules of said Territorial Supreme Court,be recognized as either a motion for a new trial or petition for rehearing or that same was not filed within the time or in the manner prescribed by said rules. It is a sufficient answer to this contention, if made, that there is nothing in the record even tending

to show what the rules of said court are and that the court, itself, has treated said pleading as both a return to the peremptory writ of mandamus and a petition or application for rehearing as shown by its order of December 2, 1898, SUPRA. There is no doubt but that said Territorial Supreme Court had the power to have quashed or set aside said peremptory writ in pursuance of the prayer contained in said application.

Merrill on Mandamus, Sec. 297.

State v. Assessors, etc. 51 N. J. L 279, 17 Atl. 122.

In Texas & Pacific Ry. Co. v. Murphy, SUPRA, it is said by Chief Justice Waite, speaking for the court, that: "This record does not show, in express terms, "when a motion for a rehearsing was made, but it was "entertained by the court and decided on its merits. "The presumption is, therefore, in the adsence of any-"thing to the contrary, that it was filed in time to "give the court control of the judgment which had "been entered, and jurisdiction to enforce any order "that might be made. This presumption has not been "overcome." Apply the rule just laid down to the facts disclosed by the record in the case at bar and it seems clear that plaintiff in error has sixty days, Sundays exclusive, from the order of December 2, 1898, within which to serve his writ of error and appeal and give supersedeas bond.

Had the Territorial Supreme Court made an order striking the pleading in question from the files (which, it must be presumed, said court would have done were the pleading not one properly cognizable under the rules or had it been filed out of time) instead of de-

termining same on its merits, then the time limited for an appeal or writ of error would doubtless have commenced to run from the date of the original judgment (September 3rd, 1898,) unless plaintiff in error should show affirmatively that his said pleading is one which, under the rules of the court, ought to have been considered and passed upon.

The real reason, as counsel understands, why the Supreme Court of the Territory of Oklahoma and John H. Burford, chief justice thereof, denied a supersedeas in this cause, is because they hold that the judgment is one which cannot legaly be superseded. It is true that said chief justice assigns two additional reasons in his order of December 8, 1898, (supra) for denying the application of this plaintiff in error and appellant to be permitted to give a good and sufficient supersedeas bond staying further proceedings on said judgment; but there certainly can be no force in either of these. In fact, the first one so assigned is not entirely correct, as an order was passed by the Territorial Supreme Court (in pursuance to requests in pleadings previously filed) allowing an appeal to this Honorable Court, just prior to the one passed by said lower court committing this appellant to jail. The other reason so assigned by the Honorable Chief Justice of said court, to-wit: That he believes, "there can be no serious controversy as to the ques-"tions of law involved in said cause," is truly remarkable. The question of a party's right to a supersedeas surely cannot be affected by the opinion of one of the trial judges (who joins in rendering the decision against said party) upon the merits of the controversy. Of course, the Honorable Chief Justice

of the court below believed that the contentions of this plaintiff in error were not sustained by the law applicable thereto else he could not consistently have concurred in the judgment rendered in the cause. This very belief on the part of the chief justice and a majority of the other members of said court furnishes the necessity for this proceeding in error. However, as to the importance of the legal questions involved herein, I call attention to the fact that they have been decided both ways by the Territorial Supreme Court and that each decision was by a divided court.

Gray vs Stiles, 49 Pac. 1083; and
Wallace vs Bullen, 52 Pac. 954.

That the judgment is one which can properly be superseded, I think, there can be no doubt. In the Oklahoma code in the Ariticle on Mandamus it is provided that: "No other pleading or written allegation "is allowed than the writ and answer; these are the "pleadings in the case, and have the same effect, and "are to be construed and may be amended in the same "manner, as pleadings in a civil action; and the issues "thereby joined must be tried, AND THE FURTHER "PROCEEDINGS THEREON HAD, in the same manner as "in a civil action."

Sec. 724 (4603) Stat. 1893.

By this statutory provision the common law character of the writ of MANDAMUS is materially changed and the proceedings in this class of actions before, during and after trial are the same as in other civil causes. It has been repeatedly decided by this Honorable Court that the proper mode of re-

viewing the final judgment of an inferior court in a MANDAMUS proceeding is by a writ of error and that during the pendency of such writ a sufficient bond of indemnity acts as a SUPERSEDEAS.

U. S. v. Addison, 22 How. 174.
Hartman v. Greenhow, 102 U. S 672.
Davies v. Corbin, 112 U. S. 36.

See also the recent case of State v. Superior Court, 25 Pac. 1007, wherein the Supreme Court of Washington passed upon substantially the same question here under consideration and upon a statute very similar to the one herein quoted from the Oklahoma Code.

As a reason for speedy action, by this Honorable Court, upon the motion for SUPERSEDEAS, special attention is called to the fact that plaintiff in error is now (and has been for several weeks) in the jail of Oklahoma county for failure to perform the final judgment of said Territorial Supreme Court in this cause.

Respectfully Submitted,

James J. R. KEATON,
For Plaintiff in Error and Appellant.

APPENDIX.

In addition to the facts hereinbefore stated by plaintiff in error attention is called to the following affidavit executed and filed in his behalf in the court below as part of his petition in error (R. p. 57.)

IN THE SUPREME COURT

OF THE

TERRITORY OF OKLAHOMA.

Territory of Oklahoma Ex Rel, Harper S. Cunningham, as Attorney General, Plaintiff.
vs.
Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.

Affidavit Showing Amount in Controversy.

TERRITORY OF OKLAHOMA, } ss.
COUNTY OF OKLAHOMA. }

James R. Keaton, of lawful age, being first duly sworn according to law, on his oath, says: That he is attorney for the defendant, Richard F. Caffrey, in the above entitled action; that he is familiar with the controversy involved in this cause and knows the amount at issue therein, and involved therein, and of controversy therein, and knows the amount in controversy in said cause exclusive of costs to exceed the sum of five thousand dollars ($5,000.00) and to be about the sum of twenty-eight thousand, seven hundred and fifty-one dollars and eighty seven cents ($28,751.87).

JAMES R. KEATON.

Subscribed and sworn to before me, this 5th day of December, 1898.

[SEAL] BENJ. F. HEGLER.
Clerk Supreme Court, Oklahoma Territory.

No. 182.

Brf. of Keaton for P. in Error on mo

Office Supreme Court U. S.
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk

Filed March 6, 1899.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. ~~681.~~ 182

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant

vs

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney General, Defendant in Error and Appellee.

Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant.

JAMES R. KEATON,

For Plaintiff in Error and Appellant.

OKLAHOMAN PRINT, OKLAHOMA CITY, OK'LA

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant

vs

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney, General, Defendant in Error and Appellee.

Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant.

JAMES R. KEATON,

For Plaintiff in Error and Appellant.

As defendant in error's objections to the allowance of a supersedeas and its motion to dismiss this cause and affirm the judgment of the lower court are

based upon the same grounds and are submitted and urged together, I desire that the following observations be applied to both pleadings.

It is suggested by counsel for defendant in error that this cause should be dismissed because no federal question is involved therein. While, an important federal question is, in fact, involved in said cause and will, in due time, be presented for determination, whether or not such a question is involved is wholly immaterial to the jurisdiction of this court as that is to be determined exclusively by the amount in controversy. It is provided in section 9, Oklahoma Organic Act, that:—"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars;" 26 Stat. 86

By act of Congress of March 3, 1885, providing for appeals and writs of error from the Supreme Courts of the Territories and the District of Columbia to this court, two grounds for jurisdiction are given, the existence of either one being sufficient, towit: 1. Required Amount Involved. 2. Federal Question Involved. District of Columbia vs. Brewers, 131, U. S. 434; Street vs. Ferry, 119, U. S. 385. But, as already seen, the above act does not apply to Oklahoma.

It is next contended by counsel for defendent in error that the sum of $5000.00 is not involved in this

cause but only the sum of $3179.27, the latter being the amount of increase in the Territorial taxes of Oklahoma County caused by the twenty-four per cent increase of the assessed valuation of the property (except railroad property) of said county made by the Territorial Board of Equalization. It is conceded that the total amount of increase of taxes of said county caused by the action of said board (if same is enforced) will greatly exceed the sum of $5000.00, but counsel claims that the proper county and township boards could have reduced the rate of the respective levies made by them so as to cause no increase in the amount of local taxes. No such reductions, however, were made and the time for making them, if it ever existed, had expired long before the commencement of this action; hence, it is clear, that the real amount in controversy is the total amount of the increase of the taxes of said County caused by the action of said board which this suit was brought to enforce. In Davies vs. Corbin, 112 U. S. 36, it is said by Chief Justice Waite, in concluding the opinion of the court, that:—"The value of the matter in dispute is measured by the whole amount of the tax and not by the seperate parts into which it is to be divided when collected. It is conceded that the amount of tax is more than $5000." The amount in controversy in the case at bar is not to be determined by what might have been but was not done by strangers to this action. Furthermore, the position of counsel for defendant in error assumes that said board's action in making the increase of the assessed valuation of said county is valid and, therefore, should not have been resisted which is the very matter in dispute. Again it is

shown by the affidavit of Anna G. Caffrey, Deputy County Clerk, (see appendix) in support of motion for supersedeas, that $4480.90 of said increased amount of taxes will arise from the levy of taxes for school purposes made by the board of education of Oklahoma City under the provisions of section 1 of article 7, of Chapter 34, of the Oklahoma Session Laws of 1897 which reads, in part, as follows:—"That the board of education shall, on or before the 15th day of June of each year, levy a tax for the support of the schools of the city of the first-class for the fiscal year next ensuing, not exceeding in any one year fifteen mills on the dollar on all taxable property within the school district which is taxable according to the laws of the Territory of Oklahoma." Also that $1,044.72 of said amount will arise from the levy made by the superintendent of public instruction of said county under the provision of article 1 of chapter 45 of the Oklahoma Session Laws of 1895, which are, in part, the following:

"SECTION 1. It shall be the duty of the county superintendent, on or before the first day of April, 1895, in each county in this territory, to audit any outstanding indebtedness that may have been contracted prior to March 14th, 1893, by any original township school board, and apportion the same to the territory, formerly comprising said school township.

"SECTION 2. The last assessment returns of property subject to taxation within said school townships shall be the basis for estimating a levy to pay said indebtedness.

"SECTION 3. It shall be the duty of the county superintendent at the same time to certify to the

county clerk a special levy in addition to the annual levy athorized by law on said property sufficient to pay said indebtedness, provided such special levy shall not exceed five mills in any one year, and the county superintendent shall continue to certify such levies as aforesaid from year to year, as provided herein, until such indebtedness is fully paid.

"SECTION 4. It shall be the duty of county clerk to extend such levies on the tax rolls of the county in the same manner as is provided for other tax levies."

These two levies were made on June 15th, 1898 and April 1, 1898 respectively, while said Territorial board of equalization did not and could not (legally) meet until Monday, June 20, 1898, See Article 1, Chapter 43, Oklahoma Session Laws 1895, and did not make the order increasing the assessed valuation of Oklahoma and all but two of the other counties of the Territory until June 27, 1898. It is certain then that there could have been no legal reduction in either of said two levies after said increase in the assessed valuation was made by the Territorial board and the aggregate amount of increased taxes in these two levies alone, caused by the action of the said board, is $5,525.62, considerably more than the amount necessary to confer jurisdiction upon this court.

Where an appeal or writ of error has been allowed by the lower court and the proof in this court leaves the matter in doubt, a motion to dismiss for lack of jurisdictional amount will be denied. Rector vs. Lipscomb, 141 U. S. 557; Gage vs. Pumpelly, 108 U. S. 164. In the case at bar, however, the proof, to show jurisdictional amount, is overwhelming; consequently

the court will encounter no difficulty on this question, Micas vs. Williams, 104 U. S. 556.

Counsel next suggests that the judgment of the Territorial Supreme Court should be affirmed because the record herein shows that the writ of error was sued out and appeal taken for delay only, that the defense set up by plaintiff in error in the lower court is frivolous and that the matters there pleaded by him as a defense were finally decided adversely to his claim by the Territorial Supreme Court on the rehearing in Wallace v. Bullen, 6 Ok. 757, which decision was not appealed from. Plaintiff in error herein was not a party to the case just cited and can be bound by nothing therein decided and it is wholly immaterial to his rights whether or not the losing party to that case appealed to this court, even if it be conceded that said case presented such jurisdictional facts as to authorize an appeal.

The cases cited by counsel for defendant in error in his fourth ground of objection to the allowance of motion for supersedeas, instead of showing the controverted question in this cause to be frivolous, show precisely the contrary. The peremptory writ of mandamus granted and issued in this case was not based upon a previons judgment rendered in a case between the same parties so as to fall within the principles declared in Chanute v. Trader, 132 U. S. 210. That the case at bar is one which may properly be reviewed in this court, in addition to the authorities cited at page 16 of plaintiff in error's motion for supersedeas, see Columbian Ins. Co. v. Wheelright, 7 Wheat. 534, wherein it is held that:—"A writ of

error will lie from this court upon the judgment of the circuit courts, awarding a peremptory mandamus." But, even if the motion of defendant in error to dismiss and affirm were meritorious, it is not so presented as to entitle it to consideration by this court. Cary v. Houston & F. C. R. Co. 150 U. S. 168; Texas Land & Cattle Co. v. Scott, 137 U. S. 436; Crane Iron Co. v. Hoagland, 108 U. S. 5; City of Waterville v. Van Slyke 115 U. S. 290; see also subdivision 4 of rule 6 of this court.

Respectfully submitted,

JAMES R. KEATON,
For Plaintiff in Error.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error, APPELLANT.

vs.

TERRITORY OF OKLAHOMA, ex rel, Harper S. Cunningham, Attorney General, Defendant in Error, APPELLEE.

Supplemental Additional Showing in Support of Motion for Supersedeas.

Territory of Oklahoma, } ss.
County of Oklahoma, }

Anna G. Caffrey, of lawful age, being first duly sworn says she is the Deputy County Clerk within and for said above named County; that she has examined the books and records of said clerk's office and made a careful calculation from the matters therein contained for the purpose of ascertaining the amount of

increase in the district school taxes of Oklahoma City, said County and Territory, caused by the increase in the assessed valuation of the property of said County made by the Territorial Board of Equalization and finds said amount to be about Four Thousand Four Hundred and Eighty Dollars and Ninety Cents ($4,480.90).

Affiant further states that said Oklahoma City is a city of the first class and that the levy of taxes therein for school purposes is made by the Board of Education thereof, as provided by section 15, of article 7, of chapter 73, of the statutes of Oklahoma, 1893. as amended by section 1, of article 7, of chapter 34, of the Oklahoma session laws of 1897, and that the levy of taxes for the support of the schools of said city for the fiscal year beginning July 1, 1898, was made by the said Board of Education on the 15th day of June, 1898, and was certified by the clerk of said Board of Education to the County Clerk of said County.

Affiant further says that she has, from said records, made a careful estimate of the amount of increase of the Township school taxes levied by the Superintendent of Public Instruction of said County, under the provisions of article 1, of chapter 45, of the session laws of 1895, caused by the said increase of the assessed valuation of the property of said County, made by the said Territorial Board of Equalization, and finds said amount to be about One Thousand and Forty Four Dollars and Seventy Two cents; also that said levy was made by said County Superintendent of Public Instruction on the First day of April, 1898, and that same was based upon the 1898 assessment of the property of said County.

Affiant further states that in making the above and foregoing estimates, no account was taken of the railroad property of said County, which said property, as affiant understands, is in no way affected by the said action of the Territorial Board of Equalization.

ANNA G. CAFFREY.

Subscribed and sworn to before me, this 23rd day of January, 1899.

ASA JONES,
Probate Judge.

[SEAL.]

I hereby accept service of the above and foregoing affidavit, on behalf of the above named defendant in error and appellee, by the delivery to me of a full and correct copy thereof, this 24th day of January, 1899.

HARPER S. CUNNINGHAM,
Attorney for Defendant in Error and Appellee.

Office Supreme Court U. S.
FILED
DEC 5 1899
JAMES H. McKENNEY,
Clerk

No. 182.

Brf of Keaton & Flannery for P. & A.

In the Supreme Court

Filed Dec. 5, 1899.

...United States...

October Term, 1899.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant.

vs.

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney General, Defendant in Error and Appellee.

No. 182.

BRIEF---For Plaintiff in Error and Appellant.

JAMES R. KEATON
and
FRANCIS J. KEARFUL,
For Plaintiff in Error and Appellant.

JOHN S. FLANNERY,
Of Counsel.

CHAMPION PRINT, OKLAHOMA CITY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 182.

Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, vs. The Territory of Oklahoma on the relation of Harper S. Cunningham, Attorney General.	Error to and appeal from the Supreme Court of the Territory of Oklahoma.

STATEMENT OF FACTS.

This is an action of mandamus, commenced on August 13, 1898, by defendant in error, The Territory of Oklahoma, on the relation of Harper S. Cunningham, as Attorney General thereof, against plaintiff in

error, Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, by the filing of a motion, signed by the said Harper S. Cunningham, in the office of the clerk of the Supreme Court of Oklahoma Territory, supported by an affidavit of said Harper S. Cunningham, marked "Exhibit A" to said motion, and a certificate by S. N. Hopkins, Auditor of said Territory and Secretary of the Territorial Board of Equalization, showing the percentage and amount of increase in the assessed valuation of Oklahoma County and the Territorial rate of taxation, marked "Exhibit B" to said motion, the purpose of said action being to compel the defendant below to add to the total assessed valuation of the property of said Oklahoma County (other than the railroad property thereof,) and to the assessed valuation of each tax payer thereof, 24 per centum ordered by the Territorial board of equalization (record pages 2, 3 and 4); that on the 12th day of August, 1898, and one day prior to the filing of the said motion by plaintiff below therefor, an alternative writ of mandamns was issued by Hon. B. F. Burwell, as associate justice of the Supreme court of Oklahoma Territory, in favor of plaintiff below and against defendant below, requiring said defendant to add to the said assessed valuation of the property of said Oklahoma county, the sum of 24 per cent. or to appear before the Supreme court of said Territory on the 1st day of September, 1898, at 10 o'clock, A. M., to show cause why he had not done so (record page 5), and said alternative writ was filed in the office of the clerk of said

Supreme court on the said 12th day of August, 1898, endorsed "writ allowed B. F. Burwell, Associate Justice of the Supreme court of the Territory of Oklahoma" (record page 6); thereafter and on the said 1st day of September, 1898, the defendant below filed in said cause his answer and return to the said alternative writ of mandamus (record page 6); thereafter and on the same date plaintiff below filed its motion to quash said answer and return (record page 16); thereafter and on the 3rd day of September, 1898, the said Supreme court sustained the said motion to quash defendant's said answer and return, and rendered judgment granting a peremptory writ of mandamus against said defendant as prayed for by plaintiff in its original application (record page 16); thereafter and on the 21st day of September, 1898, a peremptory writ of mandamus was issued by the clerk of the Supreme court of Oklahoma, in pursuance of said judgment rendered on said 3rd day of September, 1898, (record, p. 17); thereafter and on the first day of October, 1898, the defendant below filed in said cause a pleading entitled "Return and Reply to Writ of Mandamus," wherein he asked the Supreme court of Oklahoma "to set aside its decision, judgment, order, and writ of peremptory mandamus," (record, p. 19); thereafter and on the 2nd day of November, 1898, the said Harper S. Cunningham as attorney general of Oklahoma, filed in said cause an application on behalf of plaintiff below for a citation to defendant, Caffrey, requiring him to show cause why he should not be punished as for contempt of court for

failing, neglecting and refusing to comply with the requirements of said peremptory writ of mandamus, (record, p. 22); thereafter and on the 22nd day of November, 1898, the citation prayed for by the said attorney general was granted by Hon. John H. Burford, Chief Justice of the Supreme Court of Oklahoma (record, p. 23); thereafter and on the 23rd day of November, 1898, the said citation was issued by the clerk of the Supreme court of Oklahoma and was served on defendant, Caffrey, on the 28th day of November, 1898, (record, p. 24); thereafter and on the 2nd day of December, 1898, defendant, Caffrey, filed in said cause his answer and return to said rule or order to show cause (record, p. 25); thereafter and on the same date a hearing was had upon defendant's answer to the peremptory writ of mandamus and application for rehearing of said cause and the same was overruled by the said Supreme court; thereafter and on the same date said court also overruled defendant's answer and return to the said rule and citation to show cause; and thereupon committed defendant to jail as for contempt of court and until he should comply with the requirements of said peremptory writ of mandamus; thereafter and on the 4th day of January, 1899, defendant below brought said cause into this court both by writ of error and appeal.

The principal legal proposition involved in this case requires a determination of the question whether or not the Territorial Board of Equalization of Oklahoma, consisting of the Governor, Secretary and Auditor

thereof, is vested with the power and jurisdiction by the provisions of Article [1], Chapter [43], of the Session Laws of 1895, to increase, arbitrarily and without competent evidence or regard for uniformity, not only the assessed valuation of a county, but the aggregate assessed valuation of all the counties of said Territory. The statute just referred to, in so far as it is strictly applicable to the question involved reads as follows:

> "The governor, territorial auditor and secretary, shall constitute the territorial board of equalization, and said board of equalization shall hold a session at the capital of the territory, commencing on the third Monday of June of each year; and it shall be the duty of said board to examine the various county assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the per centage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the Territory, and shall notify the various county clerks of the percentage so ordered to be added to or substracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from, the total value of the property assessed to each party, the percentage so ordered, and collect the taxes accordingly."

The material facts, as shown by the pleadings in this case, presenting the question stated are the following:

On June 27, 1898, a majority of the members of the Territorial board of equalization, to-wit: The governor and auditor of said Territory, met in pursuance of a former adjournment, as such board of equalization, and by order, increased the aggregate assessed valuation [not including railroad property] of all the counties of Oklahoma from $29,404,279.00, as shown by the abstracts of the assessment rolls certified to said board by the county clerks of all the counties, to the sum of $38,213,784.00, thereby increasing the assessed valuation of the different counties from three, to eighty-six per cent. except the counties of Greer, which was reduced 3 per cent. and Pottawatomie, which was neither increased nor decreased; the county of Oklahoma, wherein plaintiff in error was on said date and still is the duly and legally elected and qualified county clerk, was increased by said order 24 per cent. on an assessed valuation of $3,080,695.00, making an increase thereof in the sum of $739,366.00 [record, pages 7 to 10]; that said order was made by said Territorial board of equalization without any competent or sufficient evidence and without other evidence than the abstracts of the assessment rolls certified to said board by the county clerks of the various counties of said Territory, the statute requiring said abstracts to be so made and certified to said board being Sec. 4, Art. 6, Chap. 70, [Gen. Sec. 5623], Ok. Stat. 1893, and reads as follows:

"As soon as practicable after the assessment rolls are equalized and corrected, as provided in the two preceding sections, and before the third Monday in June next ensuing, the county clerk shall make out an abstract thereof containing:

Whole number of acres of land listed in the county and the total value thereof.

Total valuation of town lots.

Amount of property invested in merchandise.

Amount of property invested in manufactures.

Number of horses and their total value.

Number of mules and asses and their total value.

Number of cattle and their total value.

Number of sheep and their total value.

Number of swine and their total value.

Number of carriages and vehicles of every kind and their total value.

Total value of money and credits.

Total value of household furniture.

Total value of stocks or shares.

Total value of all other personalty not enumerated under the foregoing heads; and

Number of polls.

Which abstract the clerk is directed to transmit without delay to the auditor of the Territory and the county commissioners are authorized to direct the clerk to add to the above list of items such other items as they may deem advisable. And it shall be the duty of the Auditor of the Territory to furnish such forms for the use of the county commissioners, assessors, clerks and other officers of the revenue, as shall secure uniformity of proceedings and returns throughout the Territory."

Copies of the abstracts of said assessment rolls for Pottawatomie and Oklahoma counties are set out in full in the record herein (record pages 11 to 14 inclusive); "that the valuation placed upon all the taxable property of the said county of Oklahoma, as shown by the assessment roll certified by" plaintiff in error herein, to the secretary of said Territorial board of equalization, was and is the fair and true cash value of all said property, and that said valuation was equally as high as (and in some instances higher than) that of the same classes of property of the said Pottawatomie county; "that a large portion of the property so assessed and valued for taxation in said county of Oklahoma and whose valuation was so increased to the extent of 24 per centum thereof by the Territorial board of equalization consists of money;" that plaintiff in error, defendant below, offered to introduce proof in support of the issues of fact raised by his answer and return to the alternative writ of mandamus and especially to show that the valuation of the taxable property of said Oklahoma County (other than the railroad property thereof), as shown by the said abstract of the assessment roll of said county, was as high as or higher than the same or similar classes of property of said Pottawatomie county, and that said defendant demanded a trial of said issues by jury, "that the pretended order of the said territorial board of equalization in assuming to increase the valuation of all the taxable property of Oklahoma county and the other counties of the Territory, other than the railroad property thereof, was made without any notice to any of the county officers or tax-

payers of said counties and without affording any opportunity to any one in behalf of any of said counties to appear before said board and have a hearing upon the question of whether or not the orders of said board increasing the valuations of the property of said Oklahoma and the other counties of the Territory for taxation was, in any respect, fair, just or equitable" (record page 8); that the rates of the Territorial taxes for the purposes authorized by law were fixed by said board as follows:

> For general revenue, 3 mills on the dollar.
>
> For current university fund, .5 mills on the dollar.
>
> For current normal school fund, .5 mills on the dollar.
>
> For bond interest fund, .2 mills on the dollar.
>
> For education of the deaf and dumb, .5 mills on the dollar.
>
> For the education of the blind, .3 mills on the dollar. (record page 3.)

Richard F. Caffrey, defendant below, as a part of his petitions for writ of error and appeal, has assigned the following errors, towit:

> "First. The court erred in sustaining the demurrer to (or motion to quash) the return of this defendant to the alternative writ of mandamus issued in this cause.
>
> Second. The court erred in not carrying said demurrer back and sustaining same to said alternative writ of mandamus.
>
> Third. The court erred in not carrying said demurrer back and sustaining same to the motion and application filed in said cause asking

for the issuance of the alternative writ of mandamus.

Fourth. The court erred in rendering judgment upon the pleadings in favor of plaintiff and against this defendant after having sustained said demurrer to defendant's said return to the alternative writ of mandamus.

Fifth. The court erred in allowing and ordering a peremptory writ of mandamus in favor of said plaintiff and against this defendant.

Sixth. The court erred in overruling and denying defendant's return and reply filed herein on October first, 1898, to the peremptory writ of mandamus issued out of this court on September 21st, 1898, and in refusing to set aside its decisions, judgment, and order granting said peremptory writ of mandamus." (record, page 30).

ARGUMENT.

I.

The Supreme Court of Oklahoma erred in interpreting the provision of the statute creating the territorial board of equalization and prescribing its duties so as to authorize its making any material increase in the aggregate assessed valuation of all the counties of the Territory.

The language of the statute is, "and it shall be the duty of said board to examine the various county assessments and to equalize same, * * * and shall therefrom find the percentage that must be added to or deducted from the assessed valuation of each county. "Sec. 1, Art. 1, Chap. 43, Okl. Session Laws 1895, (supra page 5). In construing this language the court should, of course, take into consideration the object of its enactment, the consequences that may reasonably be expected to follow the particular interpretation given and the materials furnished said board of equalization upon which to base its action. For the purpose of equalizing the various county assessments this board is only provided with abstracts of the assessment rolls of said counties and these need only contain the statement required by Sec. 5623, Okl. Stat. 1893, (supra, page 7). Thus it is seen that this board has before it only the assessed valuations of all the counties of the Territory and must, by the terms of the statutes, equalize these

valuations by adding to or deducting from each such percentage, if any, as may be necessary for that purpose. We insist that the only reasonable interpretation to be given the language of this statute is to hold that said board must equalize the valuations furnished it in such manner as not to increase or decrease, materially, the aggregate of all these valuations. In other words, it must, in performing the functions of a board of equalization, under the provisions of said statute, deal with the valuations already furnished and not attempt to create new ones. As held by a majority of the Oklahoma Supreme Court in Gray vs. Stiles, 6 Okla. 455, 49 Pac. 1083:

> "Assessment is the same as valuation of the property taxed. This assessment and valuation must be made by the officer or officers to whom it is by the statute expressly committed. The duty and function of assessment cannot be shared in by any officer to whom it is not so granted by the express language of the statute. Equalization of property is a wholly different matter, comprehending as it does simply the ascertainment of the average of the valuations already found. It is the equalizing of individuals among each other by the township boards, and of the townships among each other by the county boards, and of the counties among each other by the territorial board of equalization. It is, in the present case, the aggregate amount of property having been ascertained by the abstract of assessment rolls furnished to the auditor of the Territory from the various counties, an ascertainment of the proper percentage which

should be added to some counties and taken away from others to place the counties upon an equal footing; the aggregate amount of property remaining the same, except from such slight raising or lowering of the amounts as may be incidental to the operation of equalization ofthe taxes among the various counties."

The proper interpretation to be given this statute is concisely stated by Mr. Justice Bierer in his concurring opinion in the same case (49 Pac. 1106), as follows:

"The territorial board of equalization is clothed purely and solely with the power of equalization of assessments, and not with the power to change valuations. It must take the valuations as returned by the county clerks, and has, in my judgment, no power whatever to change such valuations. So far as the territorial board of equalization is concerned, it makes no difference whether the assessments have been made, as they should be made, at the actual cash value of the property, or whether they have been upon a basis greater or less than that. The statute makes it the Board's duty "to examine the various county assessments and to equalize the same." The terms of this language is the sum total of its power with reference to equalization. It is to examine the county assessments. It has no power to examine anything else, nor to hear anything else, nor to review anything else, nor to decide from any other matter presented than the county assessments, and it must then equalize, and not re-assess, the same. The statute is most complete and comprehensive in defining the mode and manner of making the assessments. The individual

must give in his property under oath, and the assessing officer must also swear to the correctness of the valuations. The territorial board of equalization does not have the responsibility of determining the correctness of the valuations of the property. It hears nobody's statement under oath, and makes none of its own, and it is not presumed to know anything more about these valuations than the man who owns the property, or than the legal assessor who has imposed upon him the particular responsibility of ascertaining what these valuations are."

It has been held by a majority of the Supreme Court of Oklahoma in Wallace vs. Bullen, 6 Okla. 17, 54 Pac. 974, and several cases following it, that the legislature intended to confer jurisdiction on the Territorial board of equalization to change the assessed valuations of counties and the aggregate valuation of all the counties for the purpose of making them conform to the "true cash value" of the property assessed. This position is, we think, wholly untenable, as neither the language of the statute nor the means provided the board upon which to base its action justifies such interpretation. (Gray vs. Stiles, supra, and cases therein cited.)

In many states, the state board of equalization is expressly required to raise or lower assessments to the true or actual cash value of the property, but, wherever this power is given such boards, they are also provided with ample means for ascertaining such value. The Oklahoma board is neither required to ascertain and fix the true cash value of the property nor furnished any

means whatever for doing so. The duty of fixing the valuations of the property assessed for taxation in Oklahoma is specifically imposed upon other officers than the members of the Territorial board of equalization, whose duty in this regard, is simply "to examine the various county assessments and to equalize same." It is well settled that a board of equalization "can only exercise such powers as are expressly granted by statute." (Sioux City and Pac. R. R. vs. Washington County, 3 Neb. 30.)

Our contention as to the proper interpretation to be given the statute in question is materially strengthened by reference to other provisions of the revenue laws of Oklahoma. Section 4, Art. 2, Chap. 70 (Gen. Sec. 5583) Okla. Stat. 1893, provides that all property, both real and personal "shall be listed and assessed each year in the name of the owner thereof," etc. In Sec. 5 (5584) Id., it is provided that:

> "The list shall be signed and sworn to by the persons making it, and the oath thereto may be administered by the assessor or his deputy, or by any other officer authorized to administer oaths, and shall be certified by him, and the oath may be printed upon the blank form and shall be in substance as follows:
>
> I, A B, do solemnly swear, (or affirm) that I have listed above and within, all the lands, town and city lots, personal property, money and credits subject by law to taxation and owned, used, possessed or controlled by me, or by law required to be listed by me for any other person or persons as guardian, husband, parent, trustee, executor, administrator, receiver, ac-

counting officer, partner, factor, bailee or agent, according to the best of my knowledge."

Section 6, (5585), is in the following language:

"In case any person required to render the list under oath fail or refuse to do so, the assessor in order to perform his duty as required in section 5580 shall list the property of such person and as a penalty shall add fifty per cent to the actual value thereof and he may examine on oath any person whom he supposses to have knowledge in relation to the property required to be listed; and if any such person refuse to testify when so required, he shall forfeit the sum of five dollars, to be recovered in civil action in the name and to the use of the proper county; and the assessor shall make a minute of the names of persons refusing to swear to such list or to testify in relation to property, and shall note the same on the list and return the same to the board of county commissioners."

Section 8, [5587], is as follows:

"The assessor shall take and subscribe an oath to be certified by the officer administering it, and attach it to the assessment roll, which oath is to be in substance as follows:

"I, A. B., county or township assessor, in and for.....County, Oklahoma Territory, do solemnly swear or affirm, that the value of all property, moneys and credits, of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value

of the property of any person or body corporate, I have diligently and to the best means in my power endeavored to ascertain the true amount of value; and that, as I verily believe, the full value thereof is set forth in the above returns. And that in no case have I knowingly omitted to demand of any person of whom I was required to make it, a statement of the amount and value of his property which he was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation."

Section 9, (5388) reads as follows:

"If any person shall wilfully make or give under oath or affirmation a false list of his, her, or their taxable property, or a false list of the taxable property in the use or possession or under the control of him, her or them, and required by law to be listed shall be deemed guilty of perjury and upon conviction thereof, shall be punished therefor as is by law provided for the punishment of perjury."

Section 10 (5389) provides among other things that:

"Every inhabitant of this Territory, of full age and sound mind, unless excepted by the provisions of this act, shall list all property subject to taxation in this Territory of which he is the owner or has the control or management in the manner herein directed."

The foregoing statutory provisions, together with others quoted in Gray vs. Stiles, supra, show conclusively, we think, that the legislature never intended to

authorize the Territorial board of equalization to change the assessed valuations of the counties for the purpose of making same correspond with the actual cash value of the property assessed. In discussing this question, the writer, in his concurring opinion in Gray vs. Stiles, supra (49 Pac. 1101), used the following language, which we here adopt, to-wit:

> "I heartily agree with what is said in the foregoing opinion as to its being utterly impossible, under the law, for the territorial board of equalization to ascertain the true or actual value of any classes of property except that which it is said board's duty to assess. This position is made perfectly apparent by the provisions of Article 4, Chap. 43, Sess. Laws 1895, which make it the duty of said board "to assess all the property of the railroads and railroad corporations in the Territory of Oklahoma at its actual cash value"; and, in order that said value may be ascertained, "every person, company or corporation operating or constructing a railroad in this territory" is required to "return sworn lists or schedules of the taxable property of said railroad company or corporation as hereinafter provided." It is then specifically provided in section 5 of said article how and by whom these lists or schedules shall be made, what they shall contain, etc. It will suffice here to say that said lists or schedules shall contain a sufficient statement of the amount, character, and value of such railroad property to enable said board to determine almost (if not quite) definitely, the actual cash value thereof. Then, in section 7 of said article, it is further provided that, if the pro-

per officers fail to make the required statements or schedules, the person, company, or corporation owning such railroad property "shall forfeit, as a penalty, not less than five thousand dollars for each offense," etc. It is still further provided in section 8 of said article that the board of railroad assessors shall have the power to compel the attendance of the officers and other agents of a railroad company as witnesses to testify before said board concerning any necessary matters to enable said board to properly assess such property, and that "any president, secretary, receiver, accounting officer, servant or agent of any railroad company, who shall knowingly make any false answer to any question put to him by such board or by its order, touching the business, property, money and credits and value thereof, of said railroad company, shall be guilty of perjury, and it shall be the duty of the president of said board to prosecute any person liable to the penalties of this section immediately upon the accruing of the liability of such prosecution." How, then, can it be asserted that the legislature, which understood that all of the foregoing provisions were necessary to enable these officers, when acting as the board of railroad assessors, to determine the actual cash value of the railroad property of the territory, could [redacted] possibly have intended that said officers, when acting as the territorial board of equalization, should assume to fix the actual cash value of the other property of the territory at a different amount from that fixed by the various assessors thereof, as equalized by the township and county boards of equaliza-

tion, without any means whatever for ascertaining same except abstracts of the assessment rolls of the different counties? * * * If this court holds that said board of equalization has the power to raise the aggregate valuation of the taxable property of the territory as shown by the abstracts of the assessment rolls of all counties, by a parity of reasoning we must also hold that it is vested with the power to reduce said aggregate valuation; and, so far as the writer can discern, there will be no adequate means of correcting the action of said board, no matter to what extent it may in the future increase or decrease such aggregate value. It certainly will not be contended that a taxpayer can maintain a proceeding in court to review and correct the action of said board in this regard upon the sole ground that his property has been overvalued thereby, and, as there is no appeal therefrom, I can see no possible remedy, if this power is conceded that the taxpayers of the territory would have to correct such action, should the territorial board of equalization increase the aggregate valuation of their property to twice, or even many more times, its "true cash value." On the other hand, I can see no means with which to review and correct the action of said board should it decrease the valuation of the property of the territory to one-half, or even a less proportion, of its "true cash value." Can it be possible that the legislature ever intended to invest this body with such tremendous powers, to be exercised without the right of a hearing on the part of those affected thereby, by providing simply that "it shall be the duty of said board to examine the various

county assessments and to equalize same"?

No argument is necessary to show that if said board has the power to materially change such aggregate, it has the power to re-assess the taxable property of the Territory. The dangers which must, almost necessarily, follow the exercise of such a power are clearly pointed out by the Supreme Courts of Colorado and Montana in the cases of People vs. Lathrop, 3 Colo. 428, and State vs. State Board of Equalization, 46 Pac. 266, wherein it is held that:

> "If this claim of power on behalf of the State board to increase the valuation be admitted, why limit in the constitution the per cent that it may levy? It matters little whether the limitation be one mill or ten, if increase of valuation be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither calculate its extent nor challenge its pretentions. Over five million dollars increase this year, it may be over fifty million dollars increase next year. Under this construction of the statute the efforts of the people to establish and maintain legitimate restraints on the power to tax will have been unavailing and the checks and guards which they have embodied in their constitution to that end cease to be of practical force or value. (See also Paul vs. Pacific R. R. Co. 4 Dill., 93.)

Similar limitations to those contained in the Colorado and Montana constitutions, as to the rates of tax levies, have been enacted by the Oklahoma Legislature. See Secs. 1 and 3, Art. 2, Chap. 42, Session Laws 1895, which read in part as follows:

Section 1. "The rate of general Territorial tax shall not be less than one-half mill nor more than three mills on the dollar valuation, and in addition one-half mill each year for the erection and support of a Territorial normal school and one-half mill each year for the erection and support of a Territorial university, and such levies for county purposes as are hereinafter provided, to be apportioned to the different funds as hereinafter provided, and such other taxes as may be authorized by law."

Section 3. "The levies for county purposes shall be a separate, specific and sufficient levy for the payment of salaries, a levy for court purposes not exceeding three mills; for support of the poor, including insane, not exceeding two mills; for roads and bridges not exceeding two mills; for county supplies, not exceeding three mills."

In this connection we call special attention to the fact that said board fixed the rates of the levies for the different Territorial taxes at the maximum allowed by law. (Record Page 3, supra page 9.) What possible benefit or protection to the tax-payers of Oklahoma is afforded by the limitations upon the power of said board in fixing the rates of said levies, contained in Sec. 1, Art. 2, Chap. 43, Session Laws 1895, if it has the power to increase, arbitrarily, the aggregate assessed valuation of all the counties of said Territory? The record in this case shows that this board, at its meetings in June, 1898, increased such aggregate assessed valuation from $29,404,277.00 to $38,213,784.00. Any argument which will sustain said board's action

in making this increase of $8,809,505.00 must also concede it the power to make an increase of any greater amount which a majority of its members may, arbitrarily, decide upon. We say "arbitrarily" because it can act in no other way when it assumes to change assessed valuations, for the reason that it is not provided with sufficient means to enable it to act *quasi* judicially, justly, or intelligently in this regard; and, as shown by its own records, the action sought to be enforced in this case was not for the purpose of equalizing the assessed valuations of the different counties for the purpose of making the assessments of said counties conform to the "true cash value" of the property listed, but was, we claim, solely for the purpose of raising a greater amount of revenue. The only reason assigned by it for making this increase is the following:

> "From the computations made by the secretary of the board it was found necessary to make the following changes in the county returns reported to the board, and on motion such changes were ordered to be made, to-wit:" (Record Page 9).

What the basis or purpose of this computation was the records of the board wholly fail to show.

II.

The action of said Territorial board of equalization in increasing the assessed valuation of all the taxable property (other than railroad property) of Oklahoma and all the other counties of the Territory, except Greer and Pottawatomie, works a violation of that portion of Sec. 6, of the Oklahoma organic act prohibiting "any unequal discrimination * * * in taxing different kinds of property" and requiring that "all property subject to taxation shall be taxed in proportion to its value."

For the sake of argument and to be entirely fair, let us suppose that the secretary of this board assumed to base his computation upon the abstracts of the assessment rolls of all the counties of Oklahoma, then we contend, not only that these abstracts do not state sufficient facts to serve as a basis for such computation, but also that the board's action in making the increase of the assessed valuation of Oklahoma and the other counties is violative of that portion of Sec. 6, Oklahoma organic act, providing that no "unequal discrimination shall be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." (26 Stat. 84).

As already stated, the record in this case contains complete copies of the abstracts of the assessment rolls of Pottawatomie and Oklahoma counties. (Record pages 11 to 14). It appears that the assessed valuation of Pottawatomie county was selected as the standard by which to regulate that of each of the other counties, as it was neither increased nor decreased by said

board. A comparison of these two abstracts of assessment rolls fails to show any justification for increasing the assessed valuation of Oklahoma county by twenty-four, or any other per cent. As disclosed by an examination thereof, the number of head or articles and their average value, as well as their total value, of only a few classes of personal property, are given in each of these two abstracts. The first two classes of property listed on each abstract are: 1. Horses. 2. Mules and asses. The average value, per head, of horses, as shown by the Pottawatomie county abstract is $14.87 and the average value, per head, of horses as shown by the Oklahoma county abstract before the increase made by the board is $14.50. The average value, per head, of mules and asses as shown by the Pottawatomie county abstract is $25.59, and the average value, per head, of mules and asses as shown by the Oklahoma county abstract is $17.73. By raising the assessed value of these two classes of property twenty-four per cent in Oklahoma county, the board increased the average assessed value of horses in said county to $17.98, per head, thus making the average value of horses in Oklahoma county more than twenty-one per cent greater that of Pottawatomie county, while the average value of mules and asses in Oklahoma county, with the increase, is only $21.99, per head, or nearly seventeen per cent less than the average value, per head, of the same class of property in Pottawatomie county; thus it is seen that even in classes of property where the number and average value are given, the said twenty-four per cent increase has little, if any, tendency toward the equalization of values, even if we assume that such classes of property in these two counties are substantially of the

same size and quality and therefore of the same value; but how could this board, with nothing before it but the abstracts of assessment rolls, simply showing the number, average value and total value of horses listed for taxation in these two counties, determine that, in reality, the average value thereof was the same in each county? Class number 2 really includes two classes, to-wit: Mules and asses, and there was nothing before the board to show the number of mules or the number of asses listed for taxation in either of these two counties or any other county as it is evident that the abstracts of the assessment rolls of the other counties are in substantially the same form. It certainly cannot be assumed that the average value of asses is the same as that of mules, then how could the secretary of this board ascertain, by computation, that the value of class No. 2 of Oklahoma county should be raised 24 per cent?

Again, in a large majority of the classes of personal property listed on said abstracts, neither the number nor average value of the articles embraced within such classes is given and, in fact, in many of said classes, could not be given; for instance, class 14, on both abstracts, is "household furniture" and the aggregate value of same, as shown on the Pottawatomie county abstract, is $45,281.00 and on the Oklahoma county abstract is $63,041.00, and just how the secretary of said board could, by any computation based on these abstracts, ascertain that the assessed valuation of household furniture in Oklahoma county should be raised twenty-four per cent, although it already exceeded that of Pottawatomie county by $18,760.00 is some-

what difficult for the average mind to comprehend. The same suggestions are applicable to nearly all the classes from 14 to 31 inclusive, and which, for convenience, we here set out in parallel columns:

	Pott. Co.	Okla. Co.
15. Interest on bonds of the United States		
Bar fixtures		$ 2,460.00
16. Teritorial and other bonds	$ 100.00	
17. Stocks in any company or corporation, current rate	20.00	
18. Moneys $16,568		
19. Credits, actual value, 802	17,370.00	31,175.00
Bicycles	153.00	
20. Average value of merchants' stock for preceding year	133,664.00	263,991.00
21. Average value of merchants' moneys and credits for preceding year	12,065.00	
22. Average value of manufacturers' stock for preceding year	8,717.00	
23. Average value of manufacturers' moneys and credits for preceding year		
24. Shares in any vessel or boat		
25. Mortgages and all other securities	4,907.00	71,044.00
26. Promissory notes and accounts	14,137.00	14,263.00
27. Tax-sale certificates	59.00	311.00
28. Judgments		175.00
29. Shares in national banks	58,430.00	36,000.00
30. Improvements on unentered lands or lots not deeded	75,848.00	50,913.00
Grain on hand	1,698.00	
31. Aggregate value of all other property	38,688.00	78,046.00

It is also probably worthy of observation that the total assessed valuation of the personal property of Oklahoma county before the 24 per cent increase, exceeded that of Pottawatomie county by $25,812.00. We wish, here, to call special attention to the fact that the aggregate assessed valuation of moneys and credits in Pottawatomie county is only $17,370.00 while that of Oklahoma county for the same classes of property is $31,175.00, hence the great skill of the secretary of said board, as a mathematician, must be admitted, if he succeeded, in satisfactorily showing either that each dollar listed for taxation in Oklahoma county was, in fact, worth $1.24, or that the tax-payers of Oklahoma county failed by 24 per cent to list for taxation the full amount of dollars owned by them. In the case of State vs. Thomas (Utah) 50 Pac. 615; being the only case strongly relied upon by a majority of the Supreme Court of Oklahoma as supporting their decision that the Territorial board of equalization has the power and jurisdiction to increase, arbitrarily, the assessed valuation of any county and the aggregate assessed valuation of all the counties, it is said:

> "The statute not having been pursued, the order was defective. It was also defective because it included money in its operation. It clearly cannot be held operative as to money, for, as appears from the record, each dollar of the relators, on the assessment roll, is valued at a dollar; and, when money is so valued, no board or officer can add 5 per centum or any per centum to it. This is so under the constitution, which makes money the standard of valuation for all

taxable property. The value of all property, however, cannot be determined in the same way. Because of its dissimilarity, the process by which the judgment is formed must vary, and probably as to all property, except money, perfect equality in valuations and assessments is unattainable, owing to the fallibility of the human judgment. The value of a dollar may be determined by ascertaining that it is what it purports to be. Porter vs. Railroad Co., 76 Ill. 595. The legal value of a dollar in money is a dollar, and therefore to value and assess it at more than a dollar cannot be a valuation and assesment, "according to its value in money." This being so, the court will take notice, as matter of law, that money cannot be assessed for more than its legal value. Hence, from the nature of things, the said board cannot change the valuation of money on the assessment roll already assessed at its legal value, and thereby make it cease to conform to the mandate of the constitution. People vs. Dunn, 59 Cal. 328. It may be that the failure to except money of itself might not render the order void; but when that fact is considered in connection with the further fact, as shown by the record in this case, that the action of the board did not conform to the statute, the order cannot be upheld as a proper exercise of authority, and is therefore void."

The number of acres of land assessed for taxation in Pottawatomie county for the year 1898, was 52,187, at an average value of $3.00 per acre, making an assessed valuation of lands in said county of $156,561.00, while the total number of acres of land assessed in Oklahoma county for said year was 277,100 at an aver-

age value per acre, before the 24 per cent raise, of $3.71, making a total assessed valuation of lands in said county of $1,030,361.00; thus it is seen that by increasing the assessed valuation of the lands of Oklahoma county by 24 per cent, the disparity, between the average value per acre of said lands and the average value of those of Pottawatomie county, instead of being reduced, was increased by just that much. The Oklahoma county lands may or may not have been more valuable than those of Pottawatomie county, but upon this question, said board had no evidence whatever. Under these circumstances we think it almost self-evident that the action of said board in making this large per centage of increase is in controvention of the provisions of the organic act hereinbefore quoted. Had this board been empowered by the statute creating it and prescribing its duties, to equalize the property of the various counties by classes instead of in bulk the abuses flowing from the attempted exercise of this power might not have been so flagrant. It is held in Dayton vs. Board of Equalization (Or.) 50 Pac. 1909, that any attempted equalization of the assessed valuation of personal property between the different counties without a just and reasonable classification thereof "would increase, instead of diminish the disparity between the values."

The record in that case shows that the personal property of all the counties of the State except the county of Marion, had been divided into appropriate classes and the state board had equalized these classes.

It appears from the tabulated statement that per-

sonal property was classified upon the assessment roll of Marion county under three heads only, to-wit: "Railroad rolling stock," "live stock," and "personal property, except railroad rolling stock and live stock." And in the attempted equalization of the personal property of Marion county with that of the other counties the said State board of equalization "added 10 per cent to the aggregate valuation of live stock." It was the duty under the statue, of said board to equalize the personal property of the different counties of the State by adding to or deducting from the aggregate valuation of the several kinds or classes thereof so as to make them conform to their true cash value. The constitution of said State requires uniformity and equality in the rate of assessment and taxation. In concluding upon this question the Oregon Supreme Court said:

> "Horses and mules may have been valued relatively lower in Marion than in Baker and Benton, and cattle, sheep and goats, and swine very much higher; but, by a comparison with live stock in the other counties of the state,—and this is the only way by which relative values can be determined,—it may appear that live stock in Marion is assessed too high, which would necessitate a reduction thereof by the requisite percentage; but this would actually reduce the valuation upon horses and cattle in Marion county, which is already relatively lower than its kind in Baker and Benton, so that the process would increase, instead of diminish, the disparagement between the values of horses and mules in Marion and the same class of property in

> Baker and Benton. A method that will produce such a result is radically wrong, and is subversive of the constitutional requirements touching assessment and taxation. There must be uniformity of classification to produce proportional or uniform values among all the counties in the state. This is almost self-evident, and it is needless to discuss the proposition at greater length."

We concede that absolute equality in the assessment of property for the purpose of placing thereon an *ad valorem* tax is impossible and that mere irregularities resulting in slight inequalities in such assessment will not render it void (State Railroad Cases, 92 U. S. 575); but the inequalities caused by the action of the Territorial board of equalization, as shown by the record in the case at bar, are so pronounced and glaring as, necessarily, to bring said action within the inhibition declared by the Organic Act.

As already seen, the Territorial board of equalization must equalize the various county assessments solely from the information disclosed by the abstracts of assessment rolls. Then, in equalizing the assessed valuations of land between the various counties (the average value per acre being shown), the most that this board had power to do was to take the average value of lands in some county as a standard and raise or lower the average value of the lands of each of the other counties to such standard. Admitting that mules in Oklahoma county were valued too low as compared with the valuation placed upon the same class of property in Pottawatomie county, can this afford any justification for raising the valuation of the real estate of

Oklahoma county (already twenty-three and two-thirds per cent higher than that of Pottawatomie county) by 24 per cent?

This court has repeatedly held that different classes of property may be taxed by different methods providing no unjust discriminations are made, but, in the same connection, it is held, "that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners." (McHenry vs. Alford, 168 U. S. 651). How can the owners of real estate in Oklahoma county be placed in a different class, for purposes of taxation, from those of Pottawatomie county, except upon the grounds that they (probably) mostly consist of different persons and that their lands are situated in a different county? And these grounds certainly furnish no sufficient reason why the former shall bear a greater burden of taxation in proportion to the value of their property than the latter. (County of Santa Clara vs. Southern Pac. R. R. Co. 18 Fed. 385.)

III

The action of the Territorial board of equalization, as disclosed by the record in this case, amounts to the taking of the property of the tax-payers of all the counties whose assessed valuations were increased "without due process of law."

Fortunately for the tax-paying citizens of the Territories of the United States, they are clothed with the protection to their property guaranteed by article five of the amendments to the Federal Constitution, wherein it is provided that "no person shall be deprived of life, liberty or property without due process of law." It is universally held by the courts that taxation constitutes a branch of the subject of "due process of law," when applied to the question of taking of property, although in the levying and collection of the tax a more summary method of procedure must necessarily be followed than in ordinary suits between parties; but, if the tax be assessed according to value, notice to the owner and an opportunity for him to be heard, at some time after the assessment and before the tax based thereon is collected, is necessary, because the taxing officers, in estimating the value, act judicially or *quasi* judicially.

Paul vs. Pac. R. R. Co., supra.
The R. R. Tax cases, 13 Fed. 722; 8 Sawyer, 270.
County of Santa Clara vs. Southern Pac. R. R. Co., 18 Fed. 385.
Hagar vs. Reclamation District No. 108, 111 U. S. 701.
Davidson vs. New Orleans, 97 U. S. 97.

Spencer vs. Merchant, 125 U. S. 345;
Winona and St. Peter Land Co. vs. Minnesota, 159 U. S. 526.
Maish vs. Territory of Arizona, 164 U,S. 599.
Stewart vs. Palmer, 74 N. Y., 183.
The Sioux City & Pac. R. R. vs. Washington County, 3 Neb., 30.
South Platte Land Co. vs. Buffalo County, 7 Neb., 253.
Dundy vs. Richardson County, 8 Neb., 508.
Slaughter vs. City of Louisville (Ky.) 8 S. W. 917.
People vs. Union, 31 Cal. 138.
St. Joseph Lead Co. vs. Simms (Mo.) 18 S.W. 906.

If the statute fixes a time and place for the meeting of a board of equalization and provides for a hearing, at said time and place, on the part of those who may be aggrieved by its action, no notice is necessary (State Railroad Tax Cases, supra); but, where this constitutional question has been raised and considered, it never has been held, we believe, except, perhaps, by a majority of the Supreme Court of Oklahoma, that such a board may, under the pretense of equalization, re-assess the property within its jurisdiction (thereby greatly increasing the aggregate assessed valuation of said property), without notice of any kind to any person, without the right of a hearing by or on behalf of the property owners, without evidence and without the right of appeal from its decision.

As stated by Mr. Justice Field in the Railroad Tax Cases, *supra*:

> "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determ-

> ining the value of another's property, according to which it may be taxed, without affording him an opportunity of being heard respecting the correctness of their action. * * * We cannot assent to any such doctrine. It conflicts with the great principles which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty or his property without an opportunity of being heard against the proceeding."

The rule is also clearly recognized and declared by Mr. Justice Brewer, speaking for the court, in Maish vs. Territory of Arizona, *supra*, wherein it is said:

> "Again, it is contended that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence. But the testimony does not sustain this contention. The only evidence in respect to the matter was that of a witness, T. A. Judd, who testified that the board of equalization added 6 per cent to the value of stock cattle; but nowhere does it appear that this was done without proof of the value or without due notice to all parties interested. We cannot assume, in the face of the prima facie evidence furnished by the delinquent tax list, that any official failed in his duty."

It was only because the evidence, in the case just cited and quoted from, did not sustain the contention "that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence," that the rule was not enforced. In the case at bar, all the allegations contained in the return of defendant below to the alternative writ of mandamus are admitted by the demurrer to (or motion to

quash) said return, and the facts stated in said return, together with the exhibits attached thereto and made parts thereof, show conclusively that the order of the board increasing the assessed valuations of Oklahoma and all [but two] of the other counties was made "arbitrarily and without notice or evidence." [See also the recent case of Pittsburg C. C. & St. L. R. Co. vs. Board of Public Works, 172 U. S. 32.]

The soundness of this rule is practically admitted by the Oklahoma Supreme Court, but its force is sought to be avoided by said court in deciding that any increase of the assessed valuation of property above its actual cash value, is to that extent, illegal and void and that each taxpayer can maintain a separate action of injunction to restrain the collection of any tax based on said increase. Thus it is admitted by said court that the arbitrary and unlimited power, to change assessed valuations, assumed by and conceded to the Territorial board of equalization, may result in injustice and oppression. The court also foresaw that some remedy must be afforded the taxpayers or the power, so conceded, might, in its exercise, amount to partial or even absolute confiscation; hence the holding that each taxpayer may enjoin any increase in his assessment above the actual cash value of the property.

Webb vs. Renfrew, 7 Okla. 198, 54 P. 448;
Bardrick vs. Dillon, 7 Okla. 535, 54, P. 784;
Weber vs. Dillon, 7 Okla. 568; 54 P. 894.)

We will here submit a few of the reasons why the doctrine announced in these cases is unsound:

First. Oklahoma has no statute providing that a taxpayer may invoke the aid of a court of equity simply because his property may have been assessed above its cash value, and the general principles of equity do not authorize the interference of such court on this ground. It is admitted in the opinions of the court in the cases last above cited that, but for special statutory authority, courts of equity in said Territory could not assume jurisdiction on this ground, but it is therein held that such jurisdiction is conferred by Sec. 4143, Okla. Stat. 1893, which reads in part as follows:

> "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction."

This section provides for the enjoining of a "tax, charge or assessments," only when it or some distinct portion thereof is void, "and any number of persons * * * may unite in the petition filed to obtain such injunction." But the Oklahoma Supreme Court specifically holds that no two or more persons can join in an action of injunction to enjoin the collection of any tax based upon that portion of an assessment which is in excess of the cash value of the property. (Bardrick vs. Dillon; Weber vs. Dillon, supra.) In other words, said court relies on the first portion of this statute for jurisdiction and then annuls the remainder of it. In reality the statute was never intended to confer, upon a court

of equity, the power and duty of ascertaining and fixing the true cash value of property, but was only intended to authorize an action of injunction by all persons within the same jurisdiction whose property is affected by an illegal tax, charge or assessment, or where some distinct and separable part of such tax or assessment is illegal and void. If a tax is partly legal and partly illegal and these two parts are so intermingled that they cannot be separated, then the whole tax will be declared void. (Taylor vs. Thompson, 42 Ill. 9). Of course, a legal tax laid upon exempt property is, as to that particular property, void, and the owners of separate articles or quantities of such property cannot unite in an action to enjoin such a tax levied thereon. This is all that was decided in Hudson vs. County Commissioners, 12 Kan. 140, cited in Bardrick vs. Dillon, supra. And it is specifically held in Stiles vs. City of Guthrie, 3 Okla. 26, also cited therein, that:

> "Several persons, whose property is affected in the same manner by the same illegal tax, may, under our statute, join in an action to restrain the collection of such tax."

It is also said in Bardrick vs. Dillon that:

> "When property is overvalued to such an extent as to raise the presumption that it was overestimated from design a court of equity will determine the true valuations," citing City of Chicago vs, Burtice, 24 Ill. 489; Knapp vs. King county, (Wash). 50 Pac. 480.

But an examination of the cases so cited shows that they do not support the statement just quoted. The decisions in both cases are based on statutes conferring

specific authority upon the courts to examine and correct the assessments and providing an opportunity to all taxpayers, who so desire, to be heard.

Sec. 105, Session Laws, Washington, 1893, contains the following provisions:

> "The court shall examine said list, and if defense [specifying in writing the particular cause of objection] be offered by any person interested in any of said lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary. manner, without pleadings, and shall pronounce judgment as the right of the case may be; or said court may, in its discretion, continue such individual cases, wherein defense is offered, to such time as it may deem necessary, in order to secure substantial justice to the defendant therein. * * * In all judicial proceedings of any kind for the collection of taxes, assessments, and the penalties, interest and costs therein, all amendments may be made which by law, can be made in any personal action pending in such court, and no assessments of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment roll * * * and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, not affecting the substantial justice of the tax itself, shall be considered by the court.,'

Sec. 106 reads as follows:

> "Appeals from the judgment of the court may be taken to the Supreme Court at any time

within six months after the rendition of said judgment, on the party praying an appeal executing a bond to the State of Washington, with two or more sureties to be approved by the court, in some reasonable amount to be fixed by the court, conditioned that the appellant will prosecute his said appeal with effect, and will pay the amount of any taxes, assessments, penalties, interest and costs which may finally be adjudged against the real estate involved in the appeal by any court having jurisdiction of the cause."

The Illinois statute is quite similar to that of Washington, but in the case of City of Chicago vs. Burtice, *supra*, it appears that the court held the entire action of the board of equalization void. As before stated there is no provision in the Oklahoma statutes conferring power upon any of the courts to review the proceedings of the Territorial board of equalization, and there is no rule of law better settled than that courts cannot review and correct the action of such a board without specific statutory authority therefor. But, if such action contravenes some provision of statutory or constitutional law, then it will be declared void *in toto* whenever the question of its validity is properly presented either to a court of equity or a court of law, and all persons affected thereby may treat it as an absolute nullity.

Second. The action of the Territorial board of equalization in raising assessed valuations affects all the taxable property of a county (except railroad property) alike, that is, the increase is the same upon all

such property; hence it is apparent that its said action must be valid *in toto* or void *in toto*. The increase made by this board is clearly separable from the previous assessed valuation of the property, and said increase, having been made in such manner as to violate several provisions of organic law applicable to Oklahoma, should be declared wholly void. If courts of equity in said Territory were required, upon application thereto, where property is assessed too high, to reduce the assessment to the actual cash value of the property so assessed, why should they not also be required to increase the valuation thereof where property is assessed at less than its true cash value? If these courts should attempt to assume the jurisdiction of increasing the valuation of all property (assessed below such standard) to its value in money, who would be proper parties plaintiff to invoke the jurisdiction of said courts for such purpose? It is evident that there may be as much discrimination, in the assessment of property, by under valuation as by over valuation and it logically follows that, in as much as the courts of Oklahoma have absolutely no means or power to correct the former, they cannot take cognizance of the latter, except in cases where the whole tax or assessment, or some distinct and clearly defined part thereof, is illegal. We are, therefore, convinced that there can be no tenable middle ground upon this question and that it must ultimately be decided that the action of the Territorial board of equalization, in changing and largely increasing assessed valuations, is entirely valid for all purposes and under all circumstances (except where gross fraud or

mistake can be shown), or that said action is beyond the scope of its jurisdiction and, consequently, wholly invalid. (Maish vs. Territory of Arizona, supra.)

Third. The remedy, by separate action of injunction on the part of each taxpayer whenever his property has been excessively valued by said board, even if it had a legal existence, would not suffice to relieve the arbitrary proceeding of the board, in increasing valuations without evidence or the right of a hearing, of the objections that it violates the provisions of the sixth section of the Oklahoma Organic Act and the fifth amendment to the federal constitution. In order to avoid these objections the statute prescribing the powers and duties of this board or some other statute specifically relating thereto must provide for notice and the right to be heard, either before said board or some other appropriate tribunal, before the obligation of the tax, upon the property owners, becomes absolute; or the board must, at least, be provided with sufficient means for procuring the necessary evidence to enable it to act understandingly in making such increase. (Pittsburg C. C. & St. L. R. Co., vs. Board of Public Works, *supra*,) Why should the courts uphold such a power and then, in order to avoid some of the disastrous consequences flowing from its exercise, constitute themselves assessing boards without the semblance of statutory authority therefor? How unreasonable for the legislature to confer power upon this board to raise assessed valuations *ad libitum*, without notice or evidence, and provide no other remedy than a separate action of injunction by each taxpayer whose assess-

ment has been so raised to more than the cash value of his property. Suppose the board raises the assessed valuation of a county above that of any other county but not above the actual cash value of the property, then what remedy have the taxpayers of the former county, under the rule laid down by the Oklahoma Supreme Court? It is clear that they have none, but, as before stated, it is equally clear that, under the Oklahoma statutes, no tax or assessment can be enjoined unless it be illegal and void.

As hereinbefore suggested the case of State vs. Thomas, *supra*, appears to have been relied on by the Oklahoma Supreme Court as the sole support of authority for holding that the Territorial board of equalization has legal authority to increase, arbitrarily, not only the assessed valuation of a county, but the aggregate assessed valuation of all the counties. (Wallace vs. Bullen, on rehearing, 6 Okla. 757; Bardrick vs. Dillon, *supra*). An examination of the Utah statutes is sufficient, it would seem, to convince the most incredulous that the principles announced in State vs. Thomas (being based on said statutes) cannot be applicable to a similar question arising under the statutes of Oklahoma prescribing the powers and duties of said board. Among other things, it is provided in Sec. 2584 Rev. Stat. Utah 1898, that:

> "The powers and duties of the state board of equalization are as follows: * * * At meetings to equalize the valuation of the taxable property of the several counties in this state for the purpose of taxation; and to that end, upon

such notice to the county auditor of the county affected thereby as it may prescribe by rule, to increase or lower any assessment contained in the assessment book, so as to equalize the assessment of the property, contained therein, and make the assessment conform to the true value in money of the property assessed. To visit as a board or by the individual members thereof, whenever deemed necessary, the several counties of the state, for the purpose of inspecting the property and learning the value thereof. To call before it, or any member thereof, on such visit, any officer of the county, and to require them to produce any public records in their custody. To issue subpœnaes for the attendance of witnesses or production of books before the board, or any member thereof; which subpœnas must be signed by a member of the board and may be served by any person."

Sec. 2585 Id. provides that:

"When, after a general investigation by the board, the property is found to be assessed above or below its full value, the board may, without notice, so determine, and must add to or deduct from the valuation of the real estate, improvements on such real estate, and the personal property, except money, such per cent, respectively, as is sufficient to raise or reduce it to its full cash value.

Sec. 2599 Id. provides for the punishment of persons who willfully disobey the subpœnas of the board and for punishment of officers who refuse to obey its rules. From the foregoing statutory provisions we learn that it is made the duty of the state board of

equalization to find "the true value in money of the property assessed" and to raise or lower each assessment to such value, also that said board is provided with ample means for ascertaining such value. Furthermore, the constitutional question here under consideration was not noticed and, presumably, not raised in State vs. Thomas, *supra*, but the court rendered judgment in favor of the relators, on other grounds, and set aside the order of said board increasing the assessment of the property of Salt Lake county. Chief Justice Zane concurred, only, in the judgment. In an earlier case which was not referred to in State vs. Thomas, the Supreme Court of Utah states the rule, which we are contending for, in the following forceful language, towit:

> "It must be conceded that there are, in jurisprudence, like axioms in exact science, certain fundamental principles which cannot be negatived or disregarded. Many of these have been recognized by the courts as well as positively declared by the highest legislative authority. Among other such, in the constitution of the United States, article 5 of the amendments, last two clauses of the article, we find that no person shall "be deprived of life, liberty, or property without due process of the law, nor shall private property be taken for public use without just compensation." This citation, which strongly illustrates the present case, justifies the subjoined statement of practical principles, which are submitted as self-evident in themselves, that is, * * * no tax is legal which is not equally and impartially laid on taxpayers; no

tax is legal which is not economical, honest, and responsible in its administration, and no tax is valid in so far as it fails to secure these conditions to the taxpayer in particular, and to the public in general. Taxation is always one of the most repulsive, and may be one of the most ruinous, exercises of public power. * * * The present case, therefore, strongly illustrates the danger of loose legislation on this most important subject. The law under consideration provides no security for the equality and impartiality of the tax which it purports to authorize. No appeal is allowed the school taxpayer such as is authorized for territorial and county taxes. No court or other tribunal is opened to him where he may be permitted to show that his own tax is too high or his neighbor's too low." (Kerr vs. Wooley; 3 Utah 456, 24 Pac. 831.)

There are cases holding that county board of equalization (composed of the county commissioners, each of whom is supposed to be well acquainted with the assessed valuations of his district), may increase the assessed valuation of a township without evidence or the right of a hearing when the statute prohibits an increase of the aggregate assessed valuation of the county. (Suydam vs. County of Merrick, 19 Neb. 155, 27 N. W. 142.) There are others holding that such local boards may so increase the assessed valuation of a township, but without referring to the question of whether or not said boards have the power to increrse the aggregate assessed valuation of all the property within their jurisdictions. [Field vs. Russell, (Kan.) 17

Pac. 476; Gillett vs. Treasurer Lyon Co., 30 Kan. 166, 1 Pac. 577.] In none of these cases, however, is the constitutional question, presented in the case at bar, discussed or noticed, hence neither of them can be considered any authority whatever upon said question. In Bardrick vs. Dillon, *supra*. the Oklahoma Supreme Court had more directly under consideration the powers of the county boards of equalization, but, as stated therein, the principles announced and conclusions arrived at in this decision apply with equal force to the power of the Territorial board of equalization and Chief Justice Burford, speaking for the court, says: "Our statute contemplates that all taxable property shall be valued for purposes of taxation at its fair cash value; and that assessing officers and equalization boards are bound when performing the duties imposed on them, to keep this fact in view. * * * In making these additions, the aggregate valuation, as shown by the assessor's returns, was materially increased. This manner of executing the power conferred by the statute was not an unreasonable one, and is not open to any valid objection;" citing approvingly Salt Lake City vs. Armstrong, 15 Utah 472, 49 Pac. 641. The principles announced in the case so cited are also inapplicable to the question under discussion, for reasons already stated, towit: dissimilarity between the statutes of Utah and Oklahoma. In the revised statutes of that State of 1898, (which is merely a compilation of the laws previously enacted), we find that the county board of equalization, consisting of the county commissioners:

"Has power, after g ving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in the assesment book so as to equalize the assessment of the property contained therein and make the assessment conform to the true value of such property in money." (Section 2575). Also that: "The board of county commissioners must use the abstract herein before provided for and all other information it may gain from the records of the county recorder or elsewhere in equalizing the assessment of the property of the county." (Sec. 2580.) After an exhaustive examination of the decided cases and provisions of the various statutes, we conclude this branch of our argument by stating that, we believe, no authority other than the Oklahoma decisions, can be found declaring a different rule than that contended for or holding that such facts as are presented by the record in this case would not bring the question under considerarion fairly within the inhibition prescribed by article 5 of the amendments to the Federal constitution.

IV.

The order of the Territorial board of equalization, increasing the assessed valuation of Oklahoma County by 24 per cent., being void, the plaintiff in error was and is under no obligation to extend such increase upon the assessment rolls of said county and he cannot be compelled to do so by an action of mandamus.

If the order of the Territorial board of equalization increasing the assessed valuations of Oklahoma and the other counties was void for any of the reasons herein before stated and urged then, of course, it was and is not incumbent upon this plaintiff in error, as county clerk of Oklahoma County, to extend the 24 per cent. increase upon the assessment rolls of said county. The writ of mandamus can only be issued "to compel the performance of an act which the law specially enjoins as a duty, resulting from an office, trust or station;" (Sec. 4595 Okla. Stat. 1893); and the law never "enjoins," upon any person, a compliance with the requirements of an order which is void for lack of jurisdiction in the board or other tribunal making same. This proposition is surely self-evident, but if it need any support of authority, such is to be found in Brownsville vs. Loague, 129 U. S. 493, wherein it is held that:

> "Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority. * * * The power invoked is not the power to tax to pay judgments, but the power to tax to pay bonds, considered as distinct and independent, and there-

fore, when the relator is obliged to go behind his judgments as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white, * * * but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." (See also Bayard vs. U. S., 127 U. S. 246; Knox County vs. Aspenwall, 24 How. 376; State vs. Kavanaugh, 24 Neb. 506; People vs. Supervisors of Greene County, 94 N. Y. 600; 14 Am. & Eng. Enc. Law 94; and cases cited under Note 2.)

In State vs. Kavanaugh, *supra*, it is held that:

"Mandamus will issue to compel action when the right of the relator is clear. In this case it cannot be said to be in that condition. The alleged returns presented to the canvassing board are a forgery. To canvas them would be a wrong, the commission of which the courts will not compel. The writ is therefore denied."

In People vs. Supervisors of Greene county, *supra*, it is held that:

"A peremptory writ of mandamus should not be granted where the claim is disputed and its validity controverted."

In fact, it is admitted by the Oklahoma Supreme Court that, if the Territorial board of equalization had no authority "to make the increase in the valuation complained of in said return," such want of authority on the part of said board would be a good defense to an action of mandamus to compel plaintiff in error to extend said increase upon the tax rolls of his county. (Territory vs. Caffrey, 57 Pac. 204.)

We do not deem it necessary here to enter upon a discussion of the questions presented by the motion to dismiss filed on behalf of defendant in error, but call special attention to the argument made and authorities cited upon said question in the brief already filed herein, entitled: "Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant."

Respectfully submitted,

JAMES R. KEATON,
and
FRANCIS J. KEARFUL,
For Plaintiff in Error and Appellant.

JOHN S. FLANNERY,
Of Counsel.

Office Supreme Court U. S.
FILED
MAR 15 1900
JAMES H. McKENNEY
CLERK

No. 182.
Add'l Brf. of Relator for P. E.

Filed Mar. 15, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 182.

RICHARD F. CAFFREY, COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

TERRITORY OF OKLAHOMA *EX REL.* HARPER S. CUNNINGHAM, ATTORNEY GENERAL, DEFENDANT IN ERROR, APPELLEE.

Additional Citation of Authorities on Question of Jurisdiction.

That plaintiff in error, as clerk of Oklahoma county, may defend this action on the ground that the action of the territorial board of Oklahoma in raising the assessed valuation of Oklahoma and the other counties of the Territory is illegal and void. (See, in addition to the authorities cited in our brief at pp. 50, 51, and 52 under subdivision 4, People *vs.* Lothrop, 3 Colo., 428; State *vs.* Raine, 47 O. St.,

447.) In Illinois a ministerial officer may defend on the ground that to comply would violate some constitutional provision (Mix *vs.* The People, 72 Ill., 241). We claim that the action of the territorial board of equalization is in contravention of the organic act and the fifth amendment to the Federal Constitution. (See also People *vs.* Mayor, etc., of Chicago, 51 Ill., 17; People *vs.* Board of Supervisors, 64 N. Y., 600.)

Respectfully submitted.

JAMES R. KEATON,
Counsel for Plaintiff in Error.

No. 182.

IN THE

Supreme Court of the United States.

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RICHARD F. CAFFREY, COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

TERRITORY OF OKLAHOMA *EX REL.* HARPER S. CUNNINGHAM, ATTORNEY GENERAL, DEFENDANT IN ERROR, APPELLEE.

ADDITIONAL SHOWING IN SUPPORT OF MOTION FOR ORDER ALLOWING SUPERSEDEAS.

Comes now Richard F. Caffrey, the plaintiff in error and appellant above named, by his counsel, James R. Keaton, and, as an additional showing in support of his motion for an order allowing him a supersedeas in said cause, submits the affidavits of himself and Henry Overholser, showing the amount in controversy therein to be the sum of twenty-six thousand eight hundred and twenty-two dollars and eighteen cents ($26,822.18), which said affidavits are hereto attached,

made parts hereof, and marked "Exhibits A and B," respectively.

Wherefore plaintiff in error and appellant prays that his motion for order allowing supersedeas or other appropriate order be granted.

JAMES R. KEATON,
For Plaintiff in Error and Appellant.

The above-named defendant in error and appellee, by Harper S. Cunningham, its attorney general, hereby acknowledges due personal service of the foregoing additional showing in support of the motion for an order allowing a supersedeas in said cause and of the exhibits attached thereto by the delivery to him of full, true, and complete copies thereof this 12th day of January, 1899.

HARPER S. CUNNINGHAM,
For Defendant in Error and Appellee.

EXHIBIT A.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

RICHARD F. CAFFREY, *County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error, Appellant,*
vs.
TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, *Attorney General, Defendant in Error, Appellee.*

TERRITORY OF OKLAHOMA, *Oklahoma County,* } *ss:*

Richard F. Caffrey, of lawful age, being first duly sworn, deposes and says that he is the clerk of said above-named county and plaintiff in error and appellant in the above-entitled action; that he has made a careful calculation of the

amount which the taxes of said Oklahoma county will be increased, if the increase in the assessed valuation of all the property (except the railroad property) of said county made by the territorial board of equalization is extended upon the tax-rolls thereof, and that the result of said calculation is as follows:

Increase of the territorial taxes.....	$3,179 27
Increase of the county, township, and municipal taxes.....	14,777 52
Increase of the school taxes.....	8,865 39
Total increase of the taxes of said county.	$26,822 18

Affiant further states that he is advised by his counsel and verily believes that at the time of the commencement of this action and at all times subsequent thereto there has been no possible legal way in which the rates of the levies for the various county and municipal purposes could be in any manner reduced had he complied with the order and judgment of the supreme court of the Territory of Oklahoma by extending said increase in the assessed valuation of the property of said county made by the territorial board of equalization upon the tax-rolls thereof.

RICHARD F. CAFFREY.

Subscribed and sworn to before me this 10th day of January, 1899.

{ Seal of Harry V. Pratt, Notary Public, Oklahoma County, Okla. }

HARRY V. PRATT,
Notary Public.

My commission expires Dec. 9, 1902.

EXHIBIT B.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

RICHARD F. CAFFREY, *County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant,*
vs.
TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, *Attorney General, Defendant in Error, Appellee.*

TERRITORY OF OKLAHOMA, *Oklahoma County,* } ss:

Comes now Henry Overholser, of lawful age, who, being first duly sworn, deposes and says that he is now and has been continuously since the first day of January, 1893, a member of the board of county commissioners of said Oklahoma county, and knows personally that said board, at its July meetings in 1898 fixed the rates of the levies for the various county funds by taking as a basis the original assessed valuation of all the property (exclusive of the railroad property therein) of said county, to wit, three million eighty thousand six hundred and ninety-five ($3,080,695.00) dollars; also that the increase in the assessed valuation of the property of said county made by the territorial board of equalization will, if extended upon the tax-rolls of said county, increase the amount of county taxes proportionately, and that it will, if so extended, cause an increase of the amount of said county taxes in the sum of about twenty-three thousand six hundred and forty-two dollars and ninety-one cents ($23,642.91), making a total increase in the amount of taxes that the tax-payers of said county will have to pay if said increase in the assessed valuation made by the territorial board of equalization is so extended of

about twenty-six thousand eight hundred twenty-two dollars and eighteen cents ($26,822.18).

And further affiant saith not.

HENRY OVERHOLSER.

Subscribed and sworn to before me this 11th day of January, 1899.

[Seal County Clerk, Oklahoma County, Okla. Ter.]

R. F. CAFFREY,
County Clerk,
By A. G. CAFFREY, *Deputy*.

[Endorsed:] No. 661. October term, 1898. In the Supreme Court of the United States, October term, 1898. Richard F. Caffrey, county clerk, *vs.* Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general. Additional showing in support of motion for order allowing supersedeas. James R. Keaton, for plaintiff in error and appellant.

[Endorsed:] File No., 17,246. Supreme Court U. S., October term, 1898. Term No., 661. Richard F. Caffrey, app't, *vs.* The Territory of Oklahoma. Affidavits in support of motion. Filed Jan'y 23, 1899.